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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 298

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

ARMOUR AND COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

ARMOUR AND COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Atchison, Topeka and Santa Fe Railway Company, et al., defendants in the trial court, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in Case No. 12195 affirming the judgment of the trial court in favor of plaintiff.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern Division of Illinois, Eastern District, is reported in 12 Federal Carrier Cases paragraph 81,193. The opinion of the United States Court of Appeals for

the Seventh Circuit is reported in 254 F. 2d 719. The opinion of the Court of Appeals appears in the Appendix to this petition. The opinion of the District Court appears on pages 70 to 79 of Appendix to Appellants' Brief certified as part of the record.

JURISDICTION.

The date of the mandate of the United States Court of Appeals for the Seventh Circuit is May 26, 1958.

No judgment order entered by that Court or notice thereof was served upon defendants. Under such circumstances the due date for filing petition for certiorari should be computed from the date of the mandate. *C.I.R. v. Bedford's Estate*, 325 U.S. 283.

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals correctly refrain from considering the application of Sections 6(1) and 6(5) of the Interstate Commerce Act in affirming Judge Perry's decision that the rate published from Hurst Mill Spur, Iowa, was valid and applicable?

2. Did the Court of Appeals correctly assume that the Hurst Mill Spur "station" and the Hurst Mill Spur "rail facilities" were separate and different entities so that the existence of one was not dependent upon the existence of the other?

3. Did the Court of Appeals correctly apply the provisions of the Interstate Commerce Act in finding that the

rate from Hurst Mill Spur was the legally applicable rate on plaintiff's shipments even though plaintiff did not rely upon that rate and suffered no injury from any of defendants' actions?

4. Did the Court of Appeals correctly find that previous cases decided by the Interstate Commerce Commission finding published rates inapplicable were not controlling in or analogous to the instant controversy.

5. Did the decision of the Court of Appeals by affirming a money judgment the full amount of which the Court of Appeals has described as a windfall, constitute so gross a miscarriage of justice as to call for the exercise by the Supreme Court of its power of supervision.

STATUTES INVOLVED

49 United States Code, Sec. 6(1).

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and present and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . ."

49 United States Code, Sec. 6(7).

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different com-

pensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charge which are specified in the tariff filed and in effect at the time . . . ."

STATEMENT OF THE CASE.

This is a suit brought by Armour & Co. under section 16(2) of the Interstate Commerce Act, 49 U.S.C. §16(2), to enforce an award of reparation made by the Interstate Commerce Commission to Armour in the approximate amount of $225,000. This award represented what the Commission found to be the amount of overcharges assessed shipments of fresh meats made by Armour during the period May 6, 1948 to September 6, 1949.

The accrual of overcharges was determined by the Commission to have resulted from defendants' failure to apply a certain rate inadvertently published from Hurst Mill Spur, Iowa. Hurst Mill Spur, Iowa, was a location identified solely by a spur track leading from the main line of the Chicago, Milwaukee, St. Paul & Pacific Railroad to a saw-mill owned by one Hurst. At the time the shipments involved moved, these facilities had all disappeared leaving only the main line of the Milwaukee railroad.

Although Hurst Mill Spur had disappeared long prior to the instant litigation, the defendants nevertheless continued to carry it in their tariffs as a point and published rates therefrom.

Except during the reparation period, the rate from Hurst Mill Spur was on the same level as the rates from all other points over which combinations of rates on fresh meats could be constructed. During the reparation period, however, the rate from Hurst Mill Spur inadvertently

became lower than the rates from the numerous other points over which fresh meat rates normally were made. Hence combinations of rates over Hurst Mill Spur, normally the same as combinations over all other points so used, became lower than the normal or "going" basis.

Plaintiff, however, did not ship during the reparation period in reliance upon the lower Hurst Mill Spur rate. Although Armour discovered this lower rate midway through the reparation period, it made no claim based thereon but continued to pay without protest the higher normal basis during the entire period. Thus, the recovery here sought constitutes a windfall and was so characterized by the Court of Appeals.

ARGUMENT.

Petitioners assert that the judgment in this case is contrary to basic principles of justice. It is a fundamental tenet of the common law that there should be no recovery of money from another except as compensation for an injury received. Yet the judgment of the District Court, affirmed by the Court of Appeals, permits such recovery in the absence of injury. Such recovery was conceded by the Court of Appeals to be a "windfall".

An attempt to recover money based upon an innocent mistake of another where there has been neither reliance nor injury has traditionally been viewed with distaste by judicial bodies. Nevertheless, despite the recognition of these facts, the Court of Appeals felt compelled to confirm the judgment of the District Court in favor of plaintiff. In so doing the Court of Appeals committed two obvious errors.

Defendants have contended that Hurst Mill Spur had disappeared as a point on their lines long prior to the movement at issue, and that as a result the rate published from such non-existent point was a nullity.

The Court of Appeals, however, approved the finding of the District Court that Hurst Mill Spur was valid and applicable. The Court stated that

> ". . . we find that there is a complete lack of authority for the proposition that the disappearance of a station's rail facilities renders invalid any rate which may be published from that station".

Defendants in this case have contended that the disappearance of rail facilities renders a rate invalid only in one circumstance: where the station and the rail facili-

ties are precisely coextensive. In other words defendants have asserted that where the station and the rail facilities are one and the same, the disappearance of the facilities constitutes the physical disappearance of the station. Ordinarily such situation does not prevail. The "point" on the line of railroad is a city, town, hamlet, industry, etc. In such situations the removal of rail facilities would still leave the industry or town as a "point" on the railroad, identifiable and in existence.

In the instant case however, there was no city, town, village or industry to constitute a physical point. The stipulation of facts indicates that there was nothing which would identify Hurst Mill Spur other than the spur, switch and related facilities, all of which had disappeared prior to the period here involved.

Hence, the question to be determined is not whether the disappearance of rail facilities in every case renders the published rate invalid. Rather the question is what effect has the disappearance of rail facilities where there is nothing other than those facilities to constitute and identify the point from which the rates are published.

It is apparent that the Court of Appeals did not address itself to the narrow question presented by the particular facts of this case.

The further ground upon which the Court of Appeals relied in affirming the decision of the District Court was that there was no authority for the proposition urged by the defendants.

If by "authority" the Court of Appeals means a direct precedent involving the same factual situation, it is true that no such precedent can be found. Nevertheless, the proposition urged by defendants is fully supported by

the applicable statutes governing the publication of rates and by analogous cases.

Sections 6(1) and 6(7) of the Interstate Commerce Act require that rates be published to "points" on a line of railroad to or from which a transportation service is provided. Although plaintiff has argued throughout that the published rate is always the applicable rate, defendants have clearly shown that the statutory requirements prevent this from being true in various instances. Thus defendants have shown that where service has been abandoned to a point, the rate published to that point is invalid. *Cancellation of Rates on Lumber to Texas*, 167 I.C.C. 561, 565 (1930). Likewise defendants have shown that a rate published to a point not reached by the physical facilities of the railroad is invalid. *Drayage & Unloading at Jefferson City, Mo.*, 206 I.C.C. 436, 441 (1935). These cases are clearly analogous to the situation here presented and are persuasive of the proposition advanced by defendants. For if a rate is invalid because of the absence of transportation service on a line of railroad, it is equally logical to find that it is invalid because of the absence of a "point" which defines the extent of the service for which the rate is published. Under the statutes both a point and a service are necessary. The absence of either renders the rate invalid.

The Court of Appeal clearly erred in finding that there was no authority for the proposition asserted by defendants.

CONCLUSION.

The rule of law that a rail carrier is bound by its published rates, even though that rate is published in error and even though the claimant has not relied thereon, is a harsh one. It has no analogy in any other field of law. For this reason it ought to be confined as narrowly as possible. Defendants have demonstrated that there are exceptions to this rule of law. The nature of these exceptions is such as to be fully persuasive that the instant case likewise constitutes an exception and that the rate from Hurst Mill Spur, although published, was nevertheless invalid.

Respectfully submitted.

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APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12195 SEPTEMBER TERM, 1957 APRIL SESSION, 1958

ARMOUR AND COMPANY, a corporation, *Plaintiff-Appellee,*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al. *Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 6, 1958

Before DUFFY, *Chief Judge*, HASTINGS and PARKINSON, *Circuit Judges.*

HASTINGS, *Circuit Judge.* An order of the Interstate Commerce Commission directed appellants, a number of railroads, to make reparation to appellee, Armour and Company, of freight rate overcharges aggregating $225,907.62 found to have been charged and paid on numerous shipments of fresh meat from Kansas City, Kansas, South St. Joseph, Missouri and South Omaha, Nebraska to numerous destinations in the East from May 6, 1948 through September 5, 1949. Armour and Company brought this action under Section 16(2) of the Interstate Commerce Act, 49 U.S.C.A. § 16(2) to enforce the Commission's order. This appeal is by the railroads from a judgment of the

district court entered on findings favorable to Armour and Company on the issues involved.

Rates on fresh meat from producing points in the West to various eastern destinations are made on the basis of aggregates of rates published to and from intermediate points along the Mississippi river which are known as Iowa border points and Mississippi river crossings. Through (one factor) rates are contained in the class rate tariffs published by the railroads but, in practice, are never paid because of the aggregate-of-intermediates rule set forth in appellants' tariff which provides:

> "If the aggregate of separately established (joint, local or proportional) rates[1] applicable on interstate traffic contained in tariffs lawfully on file with the Interstate Commerce Commission applicable via any route over which the through rates published in this tariff apply, produces a lower charge on a shipment than the rates published herein, such aggregate of rates will apply via all routes over which the rates shown in this tariff are applicable, and the through rate published in this tariff has no application to that shipment."

There is always some aggregate of rates applicable from the origins to the destinations here involved lower than the through class rates and, consequently, the effective rate at all times is based on some aggregate of the intermediate rates. The lowest aggregate of intermediate rates becomes the published rate.

During the reparation period there were thirteen west bank Mississippi river crossings, thirteen east bank cross-

[1] The various categories of rates are defined as follows: A *local* rate is one that extends over the lines of one carrier only. A *joint* rate is one that extends over lines of two or more carriers and is made by arrangement or agreement. A *proportional* rate is one dependent on a previous or subsequent transportation, that is, it applies *only* as a part of a combination or aggregate rate. Additionally, local and joint rates may be published as *flat* rates or *restricted* rates. A flat rate is a local or joint rate that is published from or to specified points and applies normally to shipments originating from or destined to that point. It may be applied as a proportional rate in the absence of proportional rates published as such. A restricted rate is either a local or joint rate published from and to specified points with limited application so that it will apply only on shipments originating at, or destined to, such points. A restricted rate thus has no application as a proportional rate.

ings and thirty-three Iowa border points. Commodity rates on fresh meats in carloads were published from the origins involved in this case to all these points; similarly, commodity rates were published from all these points to the destinations involved. Rates *from* all these points were on the same level except during the reparation period when the flat rate from Hurst Mill Spur, one of the Iowa border points, was inadvertently made lower than the rates from the other border points and river crossing.[1] As a result, the aggregate through rate based on Hurst Mill Spur was lower than the aggregate rate through the other intermediate points. This situation continued to exist until, effective September 6, 1949, the rate from Hurst Mill Spur was made to coincide with that from the other points. Although appellee discovered or became aware of the lower aggregate based on Hurst Mill either late in 1948 or early in 1949, it continued to pay the higher rates without protest throughout the reparation period.

Appellants contend that the claimed aggregate rates through Hurst Mill Spur were not legally applicable during the reparation period for the reason that that station had, in effect, been abandoned with no facilities for handling freight; and that the district court erred in its finding that the station was "a valid existing station * * * during the reparation period * * *" and in its conclusion that "[t]he aggregate of rates published to and from Hurst Mill Spur were the applicable rates * * *."

Hurst Mill Spur is characterized by appellants as having had no physical existence whatsoever during the reparation period, existing only as words in a tariff. The station

[1] This mistake was occasioned when, effective May 6, 1948, the Commission authorized an increase of 30% in the rates within the Eastern territory and of 25% between Zone 1 of the Western Trunkline and the Eastern territory. For the purposes of such increases Iowa border points and Mississippi river crossings were included in the Eastern territory. The railroads were thus authorized but not required to increase the rates from the intermediate points by thirty percent. All the crossings and border points except Hurst Mill Spur were named as points from which the 30% increase applied. There is no contention that the failure to increase Hurst Mill Spur rates to the full thirty percent limit was other than an oversight on the part of appellants.

took its name from a siding constructed in 1919 from the main line of the Chicago, Milwaukee, St. Paul & Pacific Railroad (Milwaukee Road) to a saw mill owned by Alfred Hurst. In 1927 part of the siding was removed and in 1933 the remainder of the siding and all other rail facilities were removed leaving only the railroad's main line tracks running along the west bank of the river. There are presently no facilities, rail or non-rail, existent at the location.

From the fact of non-existence of facilities appellant argues the abandonment of the station and it consequent unavailability for rate making purposes. The obligation of a railroad to charge no more than the published rates relates, it is contended, only to rates covering transportation between *existent* points or stations.[3] In this connection, however, it should be noted that the Hurst Mill Spur station, although claimed to have been actually abandoned by the Milwaukee Road in 1933, was not eliminated from the tariff of the railroad as required by Commission Rule 10(i) of Tariff Circular 20 as amended by Supplement No. 5.[4] The rule in question requires a notice of abandonment in the Official List of Open and Prepay Stations and an elimination of the station from the rate tariff in the next supplement to the tariff after the effective date of abandonment. Hurst Mill Spur station was not eliminated from the rate tariff or shown as abandoned in the Official List of Open and Prepay Stations until September 1, 1952. The

[3] See 49 U.S.C.A. §§ 6(1) and (7) which refer to rates, fares and charges for transportation between "points" on railroad routes.

[4] The rule provides:

"A tariff publication may be filed containing a list of stations with the railroad location of each, alphabetically and geographically arranged with index numbers, prepay requirements, station facilities, billing instructions from or to points not located on railroads, additions of new stations, abandonment of stations, changes in names of stations and restrictions as to non-acceptance and non-delivery of freight. No rates or charges, nor any information which will in any way increase or decrease the rate or charge in the tariffs making reference to this publication can be shown therein.

* * *

"When a station has been abandoned as of a date specified in the publication authorized by this rule, the rates from or to such station have become inapplicable and the station must be eliminated in the next supplement to tariffs naming such station or in reissues of such tariffs * * *." 291 I.C.C. 223, 230.

only notation in regard to the station in the Official List was that no facilities existed at the station for handling local shipments.

Appellants insist that their failure to comply with the rule governing abandonment does not alter the fact that the station was actually abandoned and the rate from the station invalid. It is their position that the retention of the invalid rate in the tariff may constitute a violation of Rule 10(i) and subject them to penalties under 49 U.S.C.A. § 6(10). Further, that the holding out of the invalid rate could make them liable for any damages occasioned by shippers making shipments in reliance on such rates. It is urged, however, that the invalid rate does not and cannot become valid and applicable merely because of the failure to comply with the rule.

We do not reach this last question, however, since we find that there is a complete lack of authority for the proposition that the disappearance of a station's rail facilities renders invalid any rate which may be published from that station.

Appellee introduced convincing testimony to establish that the lack of loading and unloading facilities or other station facilities does not necessarily evidence an intention to abandon a station. The Assistant Manager of appellee's rate department testified that there are railroad stations to or from which no local freight or passengers ever moved or were intended to be moved. He indicated that stations are often used as interchange points where freight is changed from one railroad to another, no freight being accepted or delivered from these points. Others are used for basing point purposes. The rates from or to these basing points are used in constructing through rates between other points. These stations as listed in the Official List of Open and Prepay Stations are noted to indicate that there are no facilities for handling freight or that they are for basing point purposes only. The witness referred specifically to East Burlington, Illinois, a station on the Chicago, Burlington and Quincy Railroad and one of the

river crossings which like Hurst Mill Spur has no facilities other than a through track. Like Hurst Mill Spur it is noted in the official list as not having facilities for handling freight. There is no note indicating that it is used for basing point purposes only. Although there are no rail facilities at East Burlington, it is a significant basing point over which rates on livestock are made from western origins to points east of the Illinois-Indiana state line. The witness indicated that these rates could not be made to and from nearby Burlington, Iowa because the rates to Burlington are published as higher flat rates rather than proportional rates.[5]

It seems clear that there is no requirement that a point must have facilities for handling freight before valid rates to and from such points can be established. As indicated in the Commission's report in this case (291 I.C.C. 223), the Official List of Open and Prepay Stations printed in the tariff contains various limitations as to station facilities. Twenty-one stations in Iowa alone are shown as having no facilities for handling freight. Many points are indicated to have only private facilities available to others only on arrangement with the owners. The notice given in the tariff that there were no facilities at Hurst Mill Spur for handling freight was clearly intended for the information of shippers who might be interested in the use of such facilities. Such notice could not be construed as a restriction against rates published in the tariff. The railroad seems to infer that because the rate published from Hurst Mill Spur was a flat rate[6] it could have applied only to shipments originating there. However, the rate was not so restricted in its application and could have been applied as a proportional rate in the absence of a proportional rate published as such. *Swift & Co. v. Alton R. Co.*, 262 I.C.C. 783, 784.

The authorities cited by appellants do not support their position on the facts in this case. The case of *Cancellation*

[5] See note 1 *supra*.

[6] See note 1 *supra*.

of Rates on Lumber to Texas, 167 I.C.C. 561, involved a carrier's proposed elimination of certain stations from tariffs naming rates on lumber and forest products. The carrier in that case had previously noted in the Official List of Open and Prepay Stations that the stations were abandoned. It contended that the cancellation of the rates was accomplished by such notation. The Commission would not pass on these contentions of the carrier but, instead, decided that the rates were inapplicable from the date of the abandonment of the service involved, that is, from the date the railroad discontinued delivery of lumber and forest products through the stations involved. As the Commission noted at page 565: "We have repeatedly held that tariffs should not be maintained to cover service which is not available." In the instant case, where the carrier was engaged in the service of transporting fresh meats, the station or point at Hurst Mill Spur was, like many other Iowa border points, used as a basing point for constructing rates on that service. The abandonment of the station rail facilities had no direct effect on the use of Hurst Mill Spur for that purpose, while the same cannot be said of the case of *Cancellation of Rates on Lumber to Texas, supra*, where the railroad had actually abandoned the service for which the rate was maintained.

Appellants also rely on *Drayage & Unloading at Jefferson City, Mo.*, 206 I.C.C. 436. This case concerned an order to cancel rates published for a service not subject to the jurisdiction of the Commission. There is nothing in the case to lend support to the position that the existence of a railroad station is dependent on physical facilities. Similarly inapposite is *Powell* v. *United States*, 300 U.S. 276 (1937).

We hold that the district court did not err in finding Hurst Mill Spur a valid, existing station and in concluding that the rate published therefrom was applicable. Appellants have established no basis for a holding contrary to the general rule that the published rate is the applicable rate.

Much of appellants' brief questions what is characterized as the basic injustice of the result sought to be achieved in this case by appellee. Appellants point out that appellee has, by stipulation, admitted that it was aware of the existence of the Hurst Mill Spur rate either late in 1948 or early in 1949 but continued to pay the "going" rate without protest. There was no reliance by appellee on any conduct of the railroads which resulted in damage to appellee. This recovery is, in effect, a windfall. Appellants concede, however, as they must, that the legality of the rate claimed applicable is not dependent upon the equities involved. The only lawful rate is the rate published in the tariff. *New York Central & Hudson River Railroad Co.* v. *York & Whitney Co.*, 256 U.S. 406 (1921); *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Fink*, 250 U.S. 577 (1919). A mistake in the publication of a rate in a tariff schedule is no justification for a departure from the published tariff. See *Beaumont, Sour Lake & Western Ry. Co.* v. *Magnolia Provision Co.*, 5 Cir., 26 F. 2d 72 (1928) in which a rate of twenty-three cents was published by mistake. The carriers intended to keep in force the pre-existing rate of seventy cents but were held bound by the published rate. The court stated at page 73:

> "In *Lamb-Fish Lumber Co.* v. *Y. & M.V.R.R. Co.*, 42 I.C.C. 470, the Interstate Commerce Commission announces the rule that proof of error in the publication of rates does not justify a departure from the published rates, even though shippers have full knowledge that the rates were published by mistake, and that decision was cited with approval by the Supreme Court in *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424, 44 S. Ct. 380, 68 L. Ed. 762."

It has also clearly been established that in a straight overcharge case based on Section 6(7) of the Interstate Commerce Act, 49 U.S.C.A. § 6(7), no proof of damage other than payment of charges in excess of the published rate is necessary. *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 202 (1913).

Four commissioners joined in a vigorous dissent from the report of the Commission ordering reparation in this case.[7] It was their position that the "strict interpretation" of the tariff adopted by the majority operated unjustly in requiring the reparation of a large sum in a case in which the shipper was not misled but indeed was fully aware of the existing situation. This court refuses to pass on the conduct of the parties involved. The railroads for reasons best known to themselves maintain a complicated rate scheme. An error resulted, but the error was not, as the railroads urge, in their having forgotten about an abandoned station, but rather in their failure to put in effect the intended rate at Hurst Mill Spur, a valid existing station. The lower rate from that station, under any interpretation of their tariff, was, during the reparation period, the published rate for the transportation of fresh meat from the western locations here involved through the intermediate points to eastern destinations.

The judgment below is

AFFIRMED.

[7] This case has posed quite a problem for the Commission. The hearing examiner in his proposed report found for Armour and Company concluding that Hurst Mill Spur was a valid station for rate making purposes. The Commission at first rejected the examiner's report holding that since there were no facilities at Hurst Mill Spur the flat rates from the station were inapplicable on shipments originating at that point and, consequently, although a flat rate could apply as a proportional rate in constructing aggregate rates, it must be applied with all the limitations surrounding it. Thus, an invalid flat rate does not become valid for proportional rate purposes. Two commissioners dissented. (288 I.C.C. 243.) On reargument, the Commission completely reversed its position holding along the same lines as the examiner in his originally proposed report. (291 I.C.C. 223).

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

The judgment order in this case was entered by the United States Court of Appeals for the Seventh Circuit on May 6, 1958. This was a formal judgment order and was separate and distinct from the opinion of the Court. The petition for certiorari was filed in this Court on August 22, 1958, one hundred and eight days after the entry of the judgment. No petition for rehearing was filed in the Court of Appeals and the period for applying for a writ of certiorari has not been extended by a Justice of this Court.

QUESTIONS PRESENTED FOR REVIEW.

There was only one issue presented in the Courts below. Did the removal of the spur track and mill from which the railroad station, Hurst Mill Spur, Iowa, took its name, and the absence of removal of all other physical facilities except the main line railroad tracks, render the rates published to and from that station void as a matter of law? The only possible issue here would be the correctness of the ruling of the lower Courts that the removal of said facilities did not render such published rates void as a matter of law.

STATEMENT OF THE CASE.

This is a suit brought by respondent, Armour and Company, pursuant to Section 16(2) of the Interstate Commerce Act (49 U. S. C. Section 16(2)) to recover overcharges (in violation of sub section 7 of Section 6 of such Act) in excess of the published rate on fresh meat shipments from Kansas City, Kansas, South Omaha, Nebraska and South St. Joseph, Missouri, to numerous destinations in the Eastern part of the United States. An award of reparation was made by the Interstate Commerce Commission. This was relied on as prima facie evidence of the truth of the factual allegations. The proceeding in the District Court was a suit at law based on the overcharge and was not an action to enforce the award of the Interstate Commerce Commission. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661.

In the case of fresh meat shipments from the origins to the destinations here involved, the railroads do not follow the normal practice of publishing one factor commodity rates. Instead, these rates are so published that to ascertain the effective rate at any time, it is necessary to find the lowest aggregate of rates based on any intermediate point on any route which is authorized under the Class-

Rate Tariff. There were routes authorized under the Class Rate Tariff during the reparation period through Hurst Mill Spur, Iowa. The aggregate of the rates to and from Hurst Mill Spur, Iowa was lower than any other aggregate of rates published during this period.

As stated in the last paragraph of the decision of the Court of Appeals, the rates to and from Hurst Mill Spur were deliberately published. Through mistake, the outbound rate from that point was only increased 25% rather than 30% as intended, but the publication and maintenance of a rate was not inadvertent (see also pages 6, 7 and 8—Additional Appendix).

The reparation period was from May 6, 1948 through September 5, 1949. It was stipulated between the parties that Hurst Mill Spur was a location on the main line tracks of the Milwaukee Railroad along the West Bank of the Mississippi River; that at one time there had been a spur track leading off from the main line track to a saw mill owned by a man named Alfred Hurst; that by 1933 all physical facilities other than the main line tracks had been removed (App. 46, 47). Petitioners' conclusion that Hurst Mill Spur had disappeared is solely their characterization of the stipulated facts. In his opening statement to the trial court, counsel for petitioners conceded that the location of Hurst Mill Spur could be physically ascertained during the reparation period (Additional Appendix, page 4). Both Courts below determined that the absence of physical facilities other than a through track is no evidence that the publication of rates to and from that point has no purpose. Rates are frequently published to and from points where there is no expectation of any local movement of freight. Important through live stock rates are made over East Burlington, Illinois, and there are no physical facilities at that point other than the main line tracks of the Burlington Railroad. The Interstate Commerce Com

mission, the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit have decided the issues in favor of respondent. The decisions of both Courts were based upon their own examination of the facts and law rather than in reliance upon the expertise of the Commission.

ARGUMENT.

I. JURISDICTION.

This Court should dismiss or deny the petition for certiorari because it was not filed within the statutory period. *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399, 417, 418. The petition flagrantly violates Rule 23 of this Court by failing to state the date of the entry of the judgment by the Court of Appeals. That judgment was entered May 6, 1958. The petition for certiorari was filed 108 days later, to-wit, on August 22, 1958. Paragraph C of Section 2101 of Title 28 U. S. C. provides that the petition must be filed within ninety days of the date of the judgment. No petition for rehearing was filed in the Court of Appeals and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (Rule 34 of this Court).

In lieu of stating the date of the entry of the judgment, petitioners cite May 26, 1958, the date of the physical return of the mandate from the Court of Appeals to the District Court, as the effective date, and cite *Commissioner of Internal Revenue* v. *Estate of Bedford, et al.*, 325 U. S. 283, as authority. That case is not in point for two reasons:

First—The "*Bedford*" case came up from the Second Circuit where the then current practice was to not immediately enter any judgment order unless the opinion itself constituted such order. This Court found that the opinion was not a judgment and further found that the order for mandate did contain all the elements of a judgment and would be construed to be the judgment order. Consequently, the time for filing a petition for certiorari ran from the date of the entry of the order for mandate. This

Court suggested that the Second Circuit amend its practice to conform to that of the other circuits. The practice of the Court of Appeals of the Seventh Circuit is entirely different. Rule 23 of its General Rules of Practice provides that on the date the opinion is handed down, a formal judgment order shall be entered and copies of the opinion shall be mailed to attorneys of record. This course of action was followed in the instant case.

Petitioners' second paragraph under the heading "Jurisdiction" is more significant for what it fails to say than for what it actually says. Literally, the statement in the first sentence is probably true. Nevertheless, petitioners did have notice of the entry of the judgment. The rules of practice provide that the judgment shall be entered on the same day the opinion is filed and a copy of the opinion was concurrently mailed to petitioners. This constitutes notice, even assuming notice was required.

If we assume that petitioners overlooked this notice, no injury resulted. It is apparent that at least by May 26, 1958, they knew the judgment had been entered. This was long prior to August 4, 1958, the last day under the Statute for filing the petition. If, after discovering that the judgment was entered, petitioners did not feel that they had sufficient time in which to prepare a petition for certiorari and persuaded this Court of the necessity, they had a clear remedy by filing an application under paragraph 4 of Rule 22 for an extension of time.

The second distinction between the instant case and the *"Bedford"* case is that there the time was held to run from the entry of the order for mandate. In the instant case there was no order for mandate. Petitioners refer not to any order but to the physical act of the Clerk of the Court in returning the mandate to the District Court. Rule 28 of the General Rules of Practice of the Court of Appeals provides that in the absence of an order to the contrary

and in the absence of a petition for rehearing, the mandate shall issue as of course twenty days after the entry of judgment. Rules 23 and 28 of the General Rules of Practice of the Court of Appeals of the Seventh Circuit are attached hereto as Appendix A to this Brief.

II. THE PETITION SHOWS NO SOUND REASON WHY THIS COURT SHOULD REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

Even had the petition been timely filed, it presents no justification for this Court issuing a writ of certiorari to review the decision of the Court of Appeals. It is necessary to go back to the issues as tried in the District Court and the Court of Appeals to ascertain if there is present here any issue even remotely resembling those set forth in Rule 19 of this Court.

In our statement of facts we have shown that under the peculiar method of publishing rates on fresh meat adopted by petitioners, the effective rate at all times is the lowest aggregate of rates to and from any point on any route authorized by the Class Rate Tariff. During the reparation period, the lowest aggregate was made over Hurst Mill Spur, Iowa. Petitioners contended these published rates to and from Hurst Mill Spur were void because of the absence of any physical facilities other than the main line tracks of the Milwaukee Railroad. The sole question presented was whether the facts set forth in paragraph 5 of the stipulation (Appendix pages 46, 47) nullified the published rates as a matter of law.

Petitioners cited no statute or decision which in any way suggests that a railroad station needs any physical facility other than a through railroad track. Superficially, their argument might have appeared plausible if they could have persuaded the Court to take judicial notice of something that is not a fact—namely, that such a railroad station and

the rates to and from such a station could serve no useful function. Respondent blocked this by proof that there is a real and proper purpose for such stations and such rates.

Petitioners contended that the equities were in their favor. This contention was based solely on the fact that the operation of two sound and well established principles of law happened to react to their detriment in this particular case. Their contentions here that the judgment of the Court of Appeals is "contrary to basic principles of justice" and "so gross a miscarriage of justice" are similarly based.

The first of these principles is that where a charge in excess of the published rate is shown, the injury is conclusive and no proof of damage is required. In *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, this Court said at page 202:

> "* * * But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge * * *".

Some of the reasons behind this are disclosed by this Court in its discussion in *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company*, 245 U. S. 531, at pages 533 to 535. It might be noted that this latter opinion is by Mr. Justice Holmes who is known for adherence to basic principles of justice.

The second principle is that the published tariff rate and only the published rate must be collected regardless of any other consideration. This has been the invariable holding of the Interstate Commerce Commission and of the Courts in a long series of well considered opinions. Among the numerous decisions of this Court enforcing this policy are

Louisville & Nashville Railroad Company v. *Maxwell*, 237 U. S. 94, 97.

New York Central & Hudson River Railroad Company v. *York & Whitney Company*, 256 U. S. 406-408.

Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. *Fink*, 250 U. S. 577, 580-582.

Davis v. *Portland Seed Co.*, 264 U. S. 403, 424.

Petitioners may not be so ready to assert that there was a gross miscarriage of justice in the first three of these cases where the carriers were allowed to recover the published rates although the shipper had been misled to his detriment.

In the Courts below petitioners neither disputed the existence nor challenged the soundness of these two principles. Instead, they asserted that the result which flows solely from the application thereof was "inequitable" and that the Court should take this into consideration in passing on their asserted defense. Both the District Court and the Court of Appeals carefully examined the alleged defense asserted by petitioners and recognized it for the sham it was.

The overall equities of this case, although irrelevant, are with respondent. This case is the result of the stubborn insistence of petitioners on a most peculiar method of rate publication. In *Combination Rates Over Western-Official Gateways*, 238 I. C. C. 347, 351, the Interstate Commerce Commission strongly suggested to the carriers that they could avoid overcharge claims of this nature and achieve other desirable results by adopting the normal method of publishing one factor through rates. This they refused to do. On an overall basis they gained by this refusal. The record in this case shows that if the recommendation of the Commission had been followed, petitioners could only have increased such rates to the level made over Hurst Mill Spur. After the end of the reparation period, their method of publication resulted in higher rates. Having deliberately

chosen this course of action and obtained the benefits, it ill behooves petitioners to shout "miscarriage of justice" when the operation of well recognized principles of law reduce the amount of the gain.

There is no issue in this case of sufficient general importance to warrant the attention of the United States Supreme Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

General Rules of Practice of the Court of Appeals for the Seventh Circuit.

OPINIONS OF THE COURT.

Rule 23. All opinions released by the court shall, on the same day, be handed to the clerk to be filed, and a copy thereof mailed to counsel for each party. In all cases except that of a decree enforcing the order of an administrative tribunal, judgment shall be entered on the date the opinion is filed. (See Rule 14(1) for decrees in reviews of administrative tribunals.)

MANDATE.

Rule 28. (a) Issuance. Unless otherwise ordered, mandate shall issue as of course 20 days after the entry of judgment unless delayed by the filing of a petition for rehearing within that period. If such petition for rehearing be denied, mandate shall issue 5 days thereafter; if granted, no mandate shall issue until final disposition of the cause.

(b) Stay. A stay of mandate granted pending application for certiorari to the Supreme Court of the United States, shall not exceed 30 days unless extended by order of this court or a judge thereof. However, if within such 30 days, or within any duly allowed extension thereof, there is filed with the clerk of this court a certificate of the clerk of the Supreme Court certifying that the certiorari petition, record and brief have been filed, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the writ of certiorari, the mandate shall issue.